UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MELISSA MAYS, individually and as next friend of three minor children, MICHAEL MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN AND RHONDA KELSO, individually and as next friend of one minor child, all on behalf of themselves and a class of all others similarly situated,

Plaintiffs,

2:16-cv-11480-JCO
HON. JOHN CORBETT O'MEARA

-vs-

LOCKWOOD, ANDREWS & NEWNAM, P.C. a Michigan Corporation, LOCKWOOD, ANDREWS & NEWNAM, INC., a Texas Corporation and LEO A. DALY COMPANY, a Nebraska corporation, VEOLIA NORTH AMERICA,, INC., a Delaware Corporation, VEOLIA NORTH AMERICA, LLC, a Delaware Limited Liability Company, VEOLIA WATER NORTH AMERICA OPERATING SERVICES, LLC, a Delaware Limited Liability Company, VEOLIA ENVIRONNEMENT, S.A., a French transnational corporation,

Defendants.

____/

RULE 12(b)(2) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION BY DEFENDANT LEO A. DALY COMPANY

1. Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, Defendant Leo A. Daly Company ("LAD") moves for an order dismissing Plaintiffs' claims against LAD for lack of personal jurisdiction.

2. LAD is a Nebraska corporation with its principal place of business in that state. It is not "essentially at home" in Michigan and thus the Court may not exercise general jurisdiction over LAD.

3. LAD is not subject to specific jurisdiction in Michigan because Plaintiffs' claims do not arise from or relate to any Michigan activity of LAD.

4. The Court may not exercise jurisdiction over LAD as owner of the LAN entities, Lockwood, Andrews & Newnam, Inc. and Lockwood, Andrews & Newnam, P.C., because Plaintiffs assert no facts indicating that LAD is the alter ego of the LAN entities. LAD does not exercise the degree of pervasive control over the LAN entities necessary to impute LAN's jurisdictional contacts to LAD. Moreover, there is no indication that LAN was incorporated for some improper purpose.

5. In the alternative, under Rule 12(b)(6), LAD adopts and joins in the Motion to Dismiss filed on January 17, 2017 by Co-Defendants Lockwood, Andrews & Newnam, P.C. and Lockwood, Andrews & Newnam, Inc.

6. In accordance with Local Rule 7.1, counsel for LAD conferred with counsel for Plaintiffs, Michael Pitt, regarding this Motion on January 17, 2017,

explaining the nature of the Motion and its legal basis, but did not obtain concurrence in the relief sought. Accordingly, the Motion is ripe for determination by the Court.

WHEREFORE, Defendant LAD requests that the Court grant this Motion, and dismiss the allegations of Plaintiffs' First Amended Complaint as they relate or apply to LAD.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS LOCKWOOD, ANDREWS & NEWNAM, P.C., LOCKWOOD, ANDREWS & NEWNAM, INC. and LEO A. DALY COMPANY

Dated: January 17, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MELISSA MAYS, individually and as next friend of three minor children, MICHAEL MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN AND RHONDA KELSO, individually and as next friend of one minor child, all on behalf of themselves and a class of all others similarly situated,

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HON. JOHN CORBETT O'MEARA

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Defendants.

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BRIEF IN SUPPORT OF RULE 12(b)(2) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION BY DEFENDANT LEO A. DALY COMPANY

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CONCISE STATEMENT OF THE ISSUES PRESENTED

Whether this Court has personal jurisdiction over LAD with regards to the claims made in Plaintiffs' First Amended Complaint?

Alternatively, whether Plaintiffs have stated causes of action against LAD?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Rules
Fed. R. Civ. P. 12(b)(2)

Cases
Michigan Coal. Of Radioactive Material Users. Inc. v. Griepentrog, 954 F.2d 1174 (6th Cir. 1992)

Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)

World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980)

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Anwar v. Dow Chemical Co., 2016 WL 304741 (E.D. Mich. Jan. 26, 2016)

Seasword v. Hilti, Inc., 449 Mich. 542; 537 N.W.2d 221 (1995)

Soloman v. Western Hills Dev. Co., 110 Mich. App. 257; 312 N.W.2d 428 (1981)

I. SUMMARY OF ARGUMENT

Plaintiffs' inclusion of Leo A. Daly Company ("LAD") in this action is erroneous. LAD had no role in the work performed by the LAN entities with respect to the Flint water supply system. Indeed, LAN does not generally undertake water infrastructure projects of that type. The Court may not exercise specific jurisdiction over LAD because Plaintiffs' claims do not arise from any activity of LAD in or directed to the forum state. General jurisdiction is unavailable because LAD is a Nebraska corporation that is not "essentially at home" in Michigan under modern jurisdictional standards.

The jurisdictional contacts of the LAN entities cannot be imputed to LAD because mere ownership of one corporation by another is a legally insufficient basis to ignore the formal corporate separation between them. Only establishing that one corporation is the alter ego of the other provides grounds for disregarding corporate separateness, and Plaintiffs plead no facts suggesting that LAD is the alter ego of the LAN entities. Certainly, they do not allege that LAD has abused the corporate form for any improper purpose. Under settled law, the claims against LAD must be dismissed for lack of personal jurisdiction.

II. STANDARDS FOR EVALUATING PERSONAL JURISDICTION

This case is in federal court by virtue of both diversity of citizenship (via the Class Action Fairness Act) and the existence of a federal question. In diversity cases, the court looks to the forum state's law to determine whether personal jurisdiction may be exercised. *Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 361 (6th Cir. 2008). The Court determines first whether Michigan law authorizes jurisdiction, and, if so, whether such authorization comports with the Due Process Clause of the Fourteenth Amendment. *Brunner v. Hampson*, 441 F.3d 457, 463 (6th Cir. 2006). In federal question cases, personal jurisdiction over a defendant exists if the defendant is amenable to service of process under the state's long-arm statue and if the exercise of personal jurisdiction would not violate the defendant's due process rights. *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002). Because Michigan's long-arm statute purports to extend jurisdiction to the limits imposed by federal constitutional due process, the two questions are effectively melded into one, focusing on the due process issue. *Family Wireless, #1 LLC. v. Automotive Technologies, Inc.*, 2015 WL 5142350 at *4 (E.D. Mich. Sept. 1, 2015)[1] (*citing Michigan Coal. Of Radioactive Material Users. Inc. v. Griepentrog*, 954 F.2d 1174, 1176 (6th Cir. 1992)).

To comply with due process, a court's exercise of its power over an out-of-state defendant must "not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This requires the

[1] Unpublished cases are found at **Exhibit A.**

defendant to have minimum contacts with the forum State ensuring that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

Personal jurisdiction may exist in two forms: general and specific. General jurisdiction does not require a connection between the defendant and the facts of the litigation. However, the defendant's contacts with the forum must be very extensive. A court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only where the corporation's affiliations with the State in which the suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum state." *Goodyear Dunlop Tires, Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851(2011).

The Supreme Court has recently clarified that the "essentially at home" formulation is, in most cases, applicable only to the corporation's place of incorporation and principal place of business. *Daimler AG v. Bauman*, 134 S.Ct. 746, 760 (2014). The Supreme Court specifically rejected a formulation that would permit the exercise of general jurisdiction wherever the corporation engaged in a substantial, continuous and systematic course of business. It found such a formulation "unacceptably grasping." *Id*. at 761.

Specific jurisdiction, by contrast, is dispute-specific. It is "confined to adjudication of issues deriving from, or connected with the very controversy that establishes jurisdiction." *Goodyear*, 131 S.Ct. at 2851. In *Southern Machine Co. v. Mohasco Indus. Inc.*, 401 F.2d 374, 381 (6th Cir. 1968), the Sixth Circuit established a three-part test to determine the constitutionality of exercising specific jurisdiction over a non-resident defendant: (1) the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise from the defendant's activities there; and (3) the acts of the defendant or consequence caused by the defendant must have had a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. The *Mohasco* test still governs the due process determination in the Sixth Circuit. *See Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 450 (6th Cir. 2012).

The requirement that the cause of action "arise from" the defendant's contacts with the forum state focuses upon whether the operative facts of the controversy arise from the defendant's contacts with the forum state. *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 723 (6th Cir. 2000). The Sixth Circuit has recently clarified that more than a "but-for" connection between a defendant's in-state activities and the claim is necessary to satisfy the "arising from" requirement. "But-for" is vastly over-inclusive and has no limiting principle. The cause of action must have a "substantial connection" to the defendant's activities in Michigan. It is only consequences that *proximately* result from a party's contacts with the forum state that permit the exercise of specific jurisdiction. *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2014) (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

Where personal jurisdiction is challenged, the plaintiff has the burden of establishing the Court's authority to proceed against the defendant. *Theunissen v. Matthews*, 93 F.2d 1454, 1458 (6th Cir. 1991). Where the motion is supported by properly documented factual assertions, the plaintiff may not rely upon his pleadings but must set forth specific facts showing that the court has personal jurisdiction. *Id*. The Court may then decide the motion on the affidavits, allow discovery of the jurisdictional facts, or if factual disputes require resolution, hold an evidentiary hearing. *Id*.

III. LAD LACKS SUFFICIENT CONTACTS WITH MICHIGAN TO CONFER JURISDICTION

An application of these principles to LAD is straightforward. First, general jurisdiction is absent. LAD is not essentially at home in Michigan. Indeed, Plaintiffs make no claim to the contrary, acknowledging that LAD is a Nebraska corporation with its principal place of business in Nebraska. (**Exhibit B**, First Amended Complaint for Injunctive and Declaratory Relief, Money Damages and

Jury Demand ("Complaint"), ¶ 16). While LAD has had and continues to have projects in Michigan, it is not especially affiliated with Michigan and most of its work has been outside the State. (Affidavit of Edward Benes, attached hereto as **Exhibit C**, hereafter "Benes Aff.," ¶ 11). As *Bauman* teaches, even if its general business contacts with the state could be characterized as "continuous and systematic," that would not be enough to confer jurisdiction over LAD in a case which did not arise from its Michigan contacts.

Likewise, the requirements for specific jurisdiction have not been met. While LAD agrees that it has had and currently has projects in the State of Michigan and that it has, for purposes of those projects, availed itself of Michigan law, Plaintiffs' claims do not arise from these contacts. Their claims, if valid at all, arise solely from work performed in connection with the Flint water treatment plant. The Complaint generally lumps LAD, LAN Inc. and LAN P.C. together under the rubric "LAN" or "Defendants." This approach is simply erroneous. LAD did not provide any service or perform any work in connection with the City of Flint Water Treatment Plant or the water distribution system. (Benes Aff. ¶ 12). Infrastructure projects such as water treatment facilities form LAN's core business activities, while LAD concentrates on architectural projects. (Benes Aff. ¶¶ 8-9). Hence, there is neither a but-for nor a proximate-cause connection between LAD's Michigan activities and Plaintiffs' claims. Thus, the second

Mohasco requirement is entirely absent. Moreover, because there is no connection between LAD's in-state activities and Plaintiffs' claims, the exercise of jurisdiction is unfair, thereby leaving the third *Mohasco* requirement also unmet.

IV. THE JURISDICTIONAL CONTACTS OF LAN MAY NOT BE IMPUTED TO LAD

Since LAD's own contacts with Michigan do not support the exercise of jurisdiction under either the general or specific jurisdiction theories, consistent with due process, Plaintiffs may attempt to argue that the "corporate veil" separating LAD and the LAN entities should be pierced and that the LAN entities' jurisdictional contacts should be imputed to LAD. While in extraordinary cases corporations may disregard corporate form to such an extent that a subsidiary's actions may be charged to the parent corporation, this is simply not one of those extraordinary cases. LAD and the LAN entities have the type of normal ownership and parent/subsidiary relationships which compels the Court to recognize their very real separate existence.

Plaintiffs do not plead any relationship between LAD and the LAN entities other than to state that "LAD's 'services are extended through [LAN Inc.]'" (Complaint ¶ 16) (brackets original). At most, Plaintiffs may establish that LAN, Inc. is a subsidiary of LAD (Benes Aff. ¶ 4). This is insufficient to establish jurisdiction.

It is fundamental that the parent/subsidiary relationship itself is insufficient to subject the parent corporation to jurisdiction. "[A] company does not purposely avail itself merely by owning all or some of a corporation subject to jurisdiction." *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1275 (6th Cir.1998). Hence, a non-resident corporation is not subject to jurisdiction "based solely upon the contacts in the forum state of another corporate entity with which it happens to be affiliated." *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1964). *See also Doe v. Unocal Corp.,* 248 F.3d 915 (9th Cir. 2001) ("existence of a relationship between a parent company and its subsidiary is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum"); *Freuendensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 346 (5th Cir. 2004), *citing Cannon Mfg. Co. v. Cudahy Packing Co.*, 263 U.S. 333, 335 (1925).

Jurisdiction also can be asserted under the alter ego theory but only where the proponent of the theory shows that the parent exercises such pervasive control that the subsidiary cannot be said to have an independent existence. *Estate of Thomson,* 545 F. 3d at 362-63. To satisfy the alter ego test under federal law, the claimant must establish that: (1) there is such a unity of interest and ownership that the separate personalities [of the two entities] no longer exist; and (2) that failure to disregard [their separate identities] would result in fraud or injustice. *Anwar v. Dow Chemical Co*., 2016 WL 304741 at * 4 (E.D. Mich. Jan. 26, 2016) (*citing Ranza v. Nike*, 793 F.3d 1059, 1073 (9th Cir. 2015)). Michigan employs a similar test, requiring a party asserting an alter ego theory to show that the subsidiary is a mere instrumentality of the parent. *Id.* at * 4, *citing Seasword v. Hilti, Inc*., 449 Mich. 542, 547; 537 N.W.2d 221 (1995). Where such allegations are made, the court considers a number of factors bearing upon whether actual corporate separation has been maintained. *Estate of Thomson*, 545 F.3d at 362-63.

Plaintiffs do not allege that the LAN entities have failed to maintain a corporate existence apart from LAD. They plead no facts indicating that any of the alter ego factors are present. Nor do they allege that LAD has somehow misused the corporate form with respect to the LAN entities. Even where corporate formalities have not been maintained, the corporate veil may not be pierced without a showing of fraud, illegality, or injustice. *Soloman v. Western Hills Dev. Co.*, 110 Mich. App. 257, 264; 312 N.W.2d 428 (1981). *See also Scarff Bros. v. Bichser Farms, Inc.*, 386 Fed. Appx. 518 (6th Cir. 2010).

The Complaint does not attempt to assert the factual basis for any attribution theory. Each company therefore can only be responsible for its own participation, if any, in allegedly causing the Flint water crisis. By including LAD as a Defendant, Plaintiffs have simply made a factual mistake. As Mr. Benes avers, the LAN Defendants and LAD provide fundamentally different services. LAD is an architectural firm, concentrating on the design of structures. LAN, Inc. is an engineering firm focused on water and other infrastructure projects. Consequently, the companies do not generally work on the same projects. (Benes Aff. ¶ 9). Each derives revenue independent of the activities of the other. (Benes Aff. ¶¶ 8-9). In short, the LAN Defendants and LAD are operationally distinct and their jurisdictional status may not be imputed from one to another.

V. FAILURE TO STATE A CAUSE OF ACTION.

In the alternative, under Rule 12(b)(6) , LAD adopts and joins in the Motion to Dismiss filed on January 17, 2017 by Co-Defendants Lockwood, Andrews & Newnam, P.C. and Lockwood, Andrews & Newnam, Inc.

CONCLUSION AND RELIEF REQUESTED

LAD is not subject to either general or specific jurisdiction in this case based upon its own contacts with Michigan, and Plaintiffs can establish no basis to impute the jurisdictional contacts of the LAN Defendants to LAD. Accordingly, the Court should dismiss the allegations of the First Amended Complaint as they relate or apply to LAD. Alternatively, LAD seeks dismissal for the reasons stated in the Motion to Dismiss filed by Co-Defendants.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS LOCKWOOD, ANDREWS & NEWNAM, P.C., LOCKWOOD, ANDREWS & NEWNAM, INC. and LEO A. DALY COMPANY

Dated: January 17, 2017

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Defendants.

____/

PROOF OF SERVICE

The undersigned certifies that a copy of this Brief was served upon all parties to the above cause to each of the attorneys of record on January 17, 2017, by ECF, and that a copy has been mailed by United States Mail, with all postage prepaid, to any parties that are not ECF participants.

/s/Robert G. Kamenec
ROBERT G. KAMENEC

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